In the United States Circuit Court of Appeals for the Ninth Circuit

FRANK E. WHELPLEY,
Appellant.
vs.
ANDREW GROSVOLD,
Appellee.

No. 3027.

Upon Appeal from the District Court For the Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

L. L. JAMES, JR., and
MORFORD & FINNEGAN,
Attorneys For Appellee.

In the United States Circuit Court of Appeals for the Ninth Circuit

F. E. WHELPLEY,
Appellant.
vs.
ANDREW GROSVOLD,
Appellee.

No. 3027.

Upon Appeal from the District Court For the Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

Council for Appellee finds it necessary to prepare this brief without first having received the brief for Appellant. We must, therefore, in this brief anticipate the argument of counsel for Appellant from the position taken upon trial, and from the specifications in the Bill of Exceptions. We deem it well first to make the following

STATEMENT OF THE CASE.

Little Koniuji Island is one of the Shumagin Group of islands situate south of Alaska Peninsula in the Territory of Alaska, Third Judicial Division. It was occupied by Rudolph Newmann during the years 1896, 1897, 1898 and 1899, and by his estate in the year 1900, (Pages 178 to 185 Transcript), for the propagation of foxes, under lease from the United States government at $100.00 per year.

From the year 1900 to 1905, there is no evidence to show the occupancy of the island in question. (Trans. page 165). From about 1905 to 1913, said island was occupied by Lawrence Reed, (page 154 Transcript), who sold his possessory right and interest in the same to Appellant herein, as agent for the Provincial Fox Company, or the Fundy Fox Co.

About January 1914, the government of the United States offered to lease Little Koniuji Island for a period of five years from July 1, 1914 to June 30, 1919, for the propagation of foxes; both Appellant and Appellee herein tendered bids to the govern ment of the United States, Appellant bidding one thousand dollars ($1,000), payable at the rate of $200.00 per year, and Appellee bidding one thousand and twenty-five dollars, ($1,025), payable at the rate of $205.00 per year. Prior to March 18, 1914, Appellant and Appellee were both advised that the bid of Andrew Grosvold, Appellee herein, had been accepted. (Page 73). and a lease was accordingly entered into with him by the government of the United States. (Page 5 Transcript). That lease has never been cancelled.

On or about the 18th day of March, 1914, Appel-

lant and his agents, through an agreement with Appellee, were permitted to remove all the property claimed by them from the said island, prior to September 1, 1914, (Pages 34 and 35 Transcript) and during that time they removed seventy-four foxes, (Page 37 Trans). and eight foxes were taken under execution against the Fundy Fox Company, (Page 144 Trans. Castle's deposition).

The Appellee went into possession of Little Koniuji Island under lease from the United States on the 1st day of September, 1914, and proceeded to plant foxes thereon and placed a keeper in charge, and thereafter, from time to time, Appellant, over the protest of Appellee, continued to go upon said island and remove foxes, removing during that time 52 additional foxes, (Pages 95 and 96) until March 12, 1916, when this action was brought by Plaintiff below, Appellee herein, to restrain Appellant from further trespassing upon said island.

ARGUMENT.

From Appellant's Assignment of Errors we assume that Appellant will contend:

1. That the Plaintiff's right of action, if any he had, was one at law and not in equity.

2. That Plaintiff's lease, which was made part of plaintiff's complaint, was void and no right accrued to plaintiff under said lease.

Anciently courts of equity would not intervene by injunction in cases of trespass, but left the party to his legal remedy, but equitable jurisdiction to enjoin the commission of trespasses on real estate, though of comparatively recent origin, is now firmly established, and more particularly is this true

under the laws of Alaska, Sec. 833 Compiled Laws of Alaska:

"The distinction between actions at law and suits in equity, and the forms of all such actions and suits, are abolished, and there shall be but one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs, which is denominated a civil action."

Pomeroy's Equity Jurisprudence, Third Edition, Vol. 4, Par. 1357:

"It is now well recognized by our courts that an injunction is a proper remedy in case of trespass where trespass is continuous in its nature, if repeated acts of wrong are done or threatened, although each of these acts taken by itself, may not be destructive, and the legal remedy may therefore be adequate for each single act IF IT STOOD ALONE, then also the entire wrong will be prevented or stopped by injunction, on the ground of avoiding a repetition of similar actions."

The allegations of the complaint show conclusively the right of ownership and possession to be absolute in plaintiff if the lease set forth in the complaint is valid. It further shows that the Appellant without right trespassed upon the premises of Appellee and wrongfully removed property therefrom, and that these trespasses were continuous and threatened to be repeated, and that the continuation of said trespasses would deprive Appellee of his beneficial use and right of said premises.

The right of Appellee to maintain his action to enjoin the trespasses alleged is sustained by the authorities:

Miller vs. Hoeschler, 99 N. W. 228; 7 L. R. A. (N. S.) 49.

Chambers vs. Haskell, 78 S. W. 478.

Camp vs. Dixon, 52 L. R. A. 755.

Notes to the case of Jerome vs. Ross, 11 Am. D. 484.

Heine vs. Roth, 2 Alaska 416.

Erhard v. Boaro et al.; 113 U. S. 537; 28 L. ed. 416,

Waskey vs. McNaught, 163 Fed. 929.

Enc. Pleading & Practice, Vol. 21, pp. 722-723.

Frank Ely vs. Railroad Co., 129 U. S. 291; 32 Law ed. 688.

AUTHORITY TO LEASE

The authority of the Secretary of Commerce and Labor to lease Little Koniuji Island for the propagation of foxes may be gathered from the various acts of Congress passed pertaining to the lands, fisheries, and to fur-bearing animals of Alaska. The first of these is an Act of May 17, 1884. 25 Stat. L., page 24, wherein it was enacted, paragraph 8: "That Indians and other persons in said District shall not be disturbed in the possession of any land actually in their use or occupation or NOW claimed by them, but the provision under which such persons may acquire title to such lands is reserved for future legislation by Congress; * * * that nothing contain ed in this act shall be construed to put in force in said District the general land laws of the United States."

The Sundry Civil Appropriation Act, 1879, 20 Stat. L. 383, provides thus:

" * * * That authority be, and is hereby,

given to the Secretary of the Treasury to lease, at his discretion for a period not exceeding five years, such unoccupied and unproductive property of the United States under his control, for the leasing of which there is no authority under existing law, and such leases shall be reported annually to Congress. * * * "

An Act of Congress approved May 14, 1898 (30 Stat., 409), entitled "An Act extending the homestead laws and providing for right of way for railroads in the district of Alaska, and for other purposes," amended by the Act of March 3, 1903 (32 Stat., 1028).

(Sec. 1. Provided) "That all the provisions of the homestead laws of the United States not in conflict with the provisions of this act, and all rights incident thereto, are hereby extended to the district of Alaska, * * * (Sec. 10 of the Act) PROVIDED, That the Annette, Pribilof Islands, and the islands leased or occupied for the propagation of foxes be excepted from the operation of this act."

On February 2, 1904, Theodore Roosevelt, President of the United States, promulgated the following order:

"IT IS HEREBY ORDERED, That the authority of the Secretary of the Treasury to lease certain islands in Alaska for the propagation of foxes, and all duties and powers pertaining thereto, shall be transferred to and vested in the Secretary of Commerce and Labor."

On March 25, 1910, William H. Taft, President of the United States, promulgated the following executive order:

"IT IS HEREBY ORDERED, That the authority transferred to and vested in the Secretary of Commerce and Labor by Executive Order of the President dated February 2, 1904, to lease certain islands in Alaska for the propagation of foxes, and all other duties and powers pertaining thereto, shall be extended to include the authority to lease the islands for the propagation of other fur-bearing animals in addition to foxes: This order to take effect March 25th, 1910."

It may be contended by Appellant that there is no authority or law authorizing the President of the United States to direct the Secretary of the Treasury or the Secretary of Commerce and Labor to lease the lands in controversy.

R. S. Sec. 441, Act of March 3, 1849 (3 Fed. Stat. Ann. page 537), reads as follows: "The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: * * * The public lands, including mines." * * * * *

R. S. 453 (6 Fed Stat. Ann. page 212), reads as follows: "The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such lands, and, also, such as relate to private claims of land." * * *

The foregoing is all of the general law giving the Interior Department jurisdiction.

The term 'public land,' as defined by the courts, and coming within the Interior Department, is tersely defined in

Newhall v. Sanger
92 U. S. 761
23 L. ed. 769

The Court said: "The words 'public lands,' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." See also

Cameron v. United States
148 U. S. 310
37 L. ed. 462

The term 'reservation,' as used in relation to the public lands, means the withdrawal of a portion of the public domain from the administration of the Land Office, and from disposal under the land laws:

Burgess v. Territory of Montana
8 Mont. 57
19 Pac. 550
1 L. R. A. 812

In the above case the court cited with approval from Volume 7, page 574, of the Opinions of the Attorney General, as follows:

"A military reservation is an act of the President, under authority of law, withdrawing so many acres of the public domain from the immediate administration of the commissioner of the public lands, that is, from sale at public aution, and by preemption or general private entry, and appropriating it for the time being to some special use of the government."

Reservations are made by Acts of Congress, treaty-making power, and by the President of the United States.

Grisar v. McDowell
6 Wall. U. S. 363
18 L. ed. 863
Wolcott v. Des Moines N. & R. Co.
5 Wall. 689
18 L. ed. 689

In the latter case the court, in construing the act granting lands to the State of Iowa, the proviso in which act is as follows: "All lands heretofore reserved, etc., by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any objects of internal improvements, etc.," said:

"It has been argued that these lands had not been reserved by competent authority, and hence that reservation was nugatory. As we have seen, they were reserved from sale * * * by the Secretary of the Treasury, when the Land Department was under his supervision and control, and again by the Secretary of the Interior, after the establishment of this department, to which the duties were assigned, and afterwards continued by this department under instructions from the President and cabinet. * * * *

The President of the United States having power to make reservations for the withdrawing of lands from the public domain, there would be embraced within that authority the right to designate what department might control the management of the lands, unless Congress had previously expressly provided for the management. The island in question had been reserved by the Act of Congress extending the homestead laws to the Territory of Alas-

ka, thus reserving it from land falling within the province of the Secretary of the Interior, no act of Congress to the contrary appearing. The President undoubtedly had full authority and power to direct the Secretary of the Treasury, and afterwards the Secretary of Commerce and Labor to lease the islands of Alaska for the propagation of foxes that had been leased or occupied prior to May 14, 1898; therefore, the leasing of Little Koniuji Island by the Secretary of Commerce and Labor to Appellee herein is clearly sustained.

The following quotation from the opinion of Attorney General Moody, (Vol. 25, pp. 502, 503), is directly in point.

"It appears that, beginning in 1882, and since that time, the Secretary of the Treasury assumed and exercised authority to lease various other islands in the waters of Alaska for the propagation of foxes. Such action seems to have been originally without statutory sanction, but in the Act of May 14, 1898, (30 Stat., 409, 413), extending the homestead laws to Alaska, Congress incorporated the following provision:

'PROVIDED, That the Annette, Pribilof Islands AND THE ISLANDS LEASED OR OCCUPIED for the propagation of foxes be excepted from the operation of this act.'

"It is not suggested that the authority of the Secretary of the Treasury in the premises was ever questioned, and such an uninterrupted and long continued practice, supported by the above-quoted statutory evidence of legislative acquiescence, seems to clearly establish the authority of the Secre-

tary of the Treasury to continue to lease for this purpose such islands in Alaska as had been so leased by him prior to the act of May 14, 1898.

"February 2, 1904, the President issued an Executive order in the following language:

" 'Upon the recommendation of the Secretary of the Treasury and the Secretary of Commerce and Labor, it is hereby ordered that the authority of the Secretary of the Treasury to lease certain islands in Alaska for the propagation of foxes, and all duties and powers pertaining thereto, shall be transferred to and vested in the Secretary of Commerce and Labor.' "

"The authority of the President to make this order, especially in the absence of any inconsistent statutory provision, seems to be beyond question. (7 Opin., 453, 462, 469; 9 Opin., 462; 25 Opin., 11; LOOKINGTON v. SMITH, Pet., C. C., 466).

"You are therefore advised that, in my opinion, you are now authorized to lease, for the propagation of foxes, such islands in the waters of Alaska as had been so leased by the Secretary of the Treasury prior to May 14, 1898."

In the case of GRISAR v. McDOWELL, supra, the Court, in considering the powers of the President to make reservations, used the following language:

"It only remains to notice the objection taken to the authority of the President to make the reservation in question. The objection is two-fold—first that the lands reserved did not constitute a part of the public domain, but were the property of the city, and were not, therefore, the subject of appropria-

tion, by order of the President, for public purposes; and second, if they did constitute a part of the public domain, they could only be reserved from sale and set apart for public purposes under the direct sanction of an Act of Congress." * * *

"From an early period in the history of the government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.

"The authority of the President in this respect is recognized in numerous Acts of Congress," * * * * * And decisions of the Courts.

Russian-American Packing Co., v. United States, 199 U. S. 570; 50 L. ed. 314

United States v. Payne, 8 Fed. 883.

Holmes v. United States, 118 Fed. 995.

Wolsey v. Chapman, 11 Otto. 755; 25 L. ed. 915.

Wilcox v. Jackson, 13 Pet. U. S. 498; 10 L. ed. 264.

Behrends v. Goldsteen, 1 Alaska 518.

From the foregoing statement of the case, the various acts of Congress, and the authorities cited it must appear that the Annette, Pribilof Islands, and the islands leased or occupied for the propagation of foxes prior to the Act of May 14, 1898, were specially reserved from the lands of the public domain that by operation of law belong to the Interior Department; and furtehr, that by proclamation of the President, February 2, 1904, and March 25, 1910, due authority has been given to the Secretary of Commerce and Labor to lease the island in contro-

versy for the propagation of foxes, and that the island was so offered for lease by the Secretary of Commerce and Labor, and that both Appellant and Appellee herein bid for the lease of Little Koniuji Island, and Appellee's bid being the highest was accepted, and a lease therefore granted to said Appellee for the propagation of foxes under the restrictions provided in said lease, therefore, the full right of Appellee herein to the exclusive possession of said island is conclusive

The only other question raised by the Appellant in the Assignment of Errors, is the question of Appellant's right to go upon the island and take therefrom the foxes that remained running at large on the island after September 1st, 1914, the time which it appears by testimony was given by Appellee herein to the Appellant to remove from the island any and all property claimed as belonging to him thereon.

It may be contended that the Appellant is a tenant holding over after the term of lease expired, and would thereby have a right to a reasonable time to remove his personal property from the lands leased by the Government to the Appellee.

From the testimony it appears that the island in controversy was leased to Ralph Neumann or Newmann, anl his administrator from 1896 to 1900. (Transcript, pages 78-185). While the Appellant by his affirmative defense in his answer alleges that the said island was vacant in 1894; that one Carlson took possession and stocked the said island with foxes and sold his right to Lawrence Reed, Appellant's grantor, in 1902 There is not a particle of

evidence introduced by Appellant to show that said Reed occupied the island prior to 1903. (Transcript, page 150), or that he acquired any right from Rudolph Neumann or his heirs, or from any other person.

Taking the allegation in the complaint and the testimony as given, it is clear that the Appellant has not, by himself or his grantor, ever been a tenant of the United States under lease or permit, prior to May 14, 1898, or by himself or his grantor, prior to 1903; that such possession as he or his grantor ever had has been that of a trespasser, and is entitled to no notice or time to remove from said island, or any preference right to lease said island by reason of his prior occupation.

In Russian-American Packing Co., v. United States, 199 U S. 570; 50 L. ed. 314, the Court said:

"Commenting on this case Mr. Justice Field observed in the YOSEMITE VALLEY CASE (p. 93, L. ed. 87) that—

" 'The whole difficulty in the argument of the defendant's counsel arises from his confounding the distinction made in all the cases whenever necessary for their decision between the acquisition by the settler of a legal right to the land occupied by him as against the owner, the United States, and the acquisition by him of a legal right as against other parties to be preferred in its purchase when the United States have determined to sell. It seems to us little less than absurd to say that a settler or any other person, by acquiring a right to be preferred in the purchase of property, providing a sale is made by the owner, thereby acquires a right to compel the

owner to sell, or such an interest in the property as to deprive the owner of the power to control its disposition." * * * *

"Petitioner gained no additional consideration from the improvements put upon the land, since, if for no other reason, these were made prior to the Act of 1891, when it was a mere trespasser, and occupying the land without a shadow of title."

In Frisbie v. Whitney, 9 Wall. 187-197; 19 L. ed. 668-672, the Court in commenting on the argument of claimant, said:

"To this we reply, as we did in the case of RECTOR v ASHLEY, 6 Wall. 142 (73 U. S. 18 L. ed. 733), that the rights of a claimant are to be measured by the Acts of Congress, and may not by what he may or may not be able to do; and if a sound construction of these acts shows that he had acquired no vested interest in the land, then, as his rights are created by the statutes, they must be governed by their provisions, whether they be hard or lenient. That was a case, also, in which it became important to ascertain when a right to public land became vested, and though it arose under statutes somewhat different from the general preemption law, the principles asserted there and in the previous cases of BAGNELL v. BRODERICK, 13 Pet., and BARRY v. GAMBLE, 3 How., 32, strongly support our conclusion in the present case." * * * *

The evidence and leases to Rudolph Neumann at and prior to 1898, places this island clearly within the reservation of the Act of Congress and withdraws it from the public lands of the United States.

The failure of the Appellant to connect his possession with that of the leassee or occupant of the island holding the same at or prior to 1898, leaves him a trespasser upon the reserved lands without any right in law or equity to go upon the land for any purposes whatsoever.

This we take to be the condition of the Appellant, viz: that no right of possession or of property inured to him, as against the Government of the United States to lease or dispose of the island, and that his position was that of a trespasser against the United States. The Appellant and his grantor went upon the lands reserved for the propagation of foses, without license or permit, and without taking any steps to acquire right or permission to occupy the island for any purpose, consequently Appellant has no preference right or privilege from the Government, either in law or equity, entitled to consideration. The Appellant was placed upon the same footing as any other citizen in applying to lease an island for the propagation of foxes, and having failed to secure the lease from the Government, and refusing to remove the property claimed by him, prior to the beginning of the term of the lease issued to Appellee herein, and within the additional time granted by Appellee to Appellant to remove the same from said island, Appellant's rights thereon ceased.

The testimony of Appellant is so contradictory that little weight can be given to it, but it may be gathered from the whole testimony that the company known as the Fundy Fox Company was the name in which all the business in Alaska was conducted for the Provincial Fox Company, the Pro-

vincial Blue Fox Company, and the Fundy Fox Company, and that Appellant was their representative in Alaska, prior to January 1st, 1914; that on January 1, 1914, Chesley D. Colwell succeeded Appellant as the authorized representative of the various companies in Alaska from January 1, 1914 to 1915, (Test. Williams, pp. 172 and 173; Test. Osler, pp. 143 and 144).

That said Colwell, as agent for the several interests, agreed with the Appellee to remove all property belonging to the several companies, on or before the first day of September, 1914, in consideration of Appellee's extending the time for such removal and delivery of possession of the island in controversy from July 1, 1914 to September 1, 1914. (Trans. pp. 34 and 35).

That pursuant to said agreement said Colwell removed seventy-four foxes, and eight were taken under attachment in a suit against the Fundy Fox Company, and on August 30, 1914, possession of said island was delivered to Appellee herein. (Test. pp. 34 to 38).

That on September 1st, 1914, Appellee took possession of said premises and ever since has been in possession thereof (Test. pp. 37 and 38).

That Appellant, since September, 1914, has wrongfully entered upon said premises and taken therefrom fifty-two foxes, (Trans. p. 95) making a total of 134 foxes taken by the Appellant and his agents from the island in controversy since July 1st, 1914, and prior to the commencement of this action. The total number of foxes upon said island July 1st, 1914, estimated by the keeper John Gardner, who

was a witness for the Appellant, was 70 pair, or 140 foxes. (Trans. page 157). It thus appearing that prior to the commencement of this action the Appellant had taken practically the full number of foxes that were on the island when the lease went into effect, and that no right either in law or equity can exist in the Appellant either to the possession of the island or the foxes.

That in 1913, Appellant and Appellee were advised that the U. S. Government proposed to lease the island in controversy for the propagation of foxes.

That Mr. Williams, for the various fox companies' interests which the Appellant represented, and the Appellee both submitted bids for the lease of the said island, (Trans. pp. 106 and 107).

That the U. S. Government accepted the bid of Appellee and executed a lease to Appellee.

That on January 1, 1914, Appellant ceased to represent the various interests, and C. D. Colwell was empowered to act for the several interests from January 1. 1914 to the year 1915, and that as such agent and representative he removed the foxes belonging to the various companies and delivered possession of the island to Appellee on September 1, 1914.

That Appellee, under his lease from the U. S. Government, with the consent of the agent for the various interests, C. D. Colwell, has been in possession of said property since September 1, 1914, and all the rights the prior companies had in said island and the property thereon were released to the Appellee herein, and that Appellant, by himself or any of the companies which he claims to represent, has had no

interest in said premises or the foxes thereon, since September 1, 1914.

Wherefore, Appellee respectfully prays that the judgment of the Trial Court be affirmed.

L. L. JAMES, JR.,

MORFORD & FINNEGAN,

Attorneys For Appellee.